No. 13443

In The

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,

vs.

ALMA RAISH, *Appellee*.

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

JURISDICTION

This is an appeal from a judgment in a civil action. This action was commenced in the Circuit Court of the State of Oregon for Multnomah County by Alma Raish, appellee herein, who was at the time of the commencement of the action an Oregon resident. Appellant Southern Pacific Company was and is a Delaware corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. The action was removed to the United States District Court for the Dis-

trict of Oregon upon appellant's petition. The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 (a) and 28 U.S.C.A. Sec. 1441 (b).

SUMMARY OF FACTS AND CONTENTIONS

Appellee was injured when a Fraser automobile in which she was riding as a passenger was struck by a Los Angeles-Seattle Motor Express truck and trailer being driven by Thomas Embleton in a southerly direction on U. S. Highway No. 99, just south of Eugene, Oregon. The Fraser automobile was stopped off the paved portion of the highway on the westerly side thereof, some distance south of a railroad overpass maintained by appellant over the highway.

There was evidence that the truck collided with a portion of the overpass and moved about 70 feet before colliding with the Fraser automobile. The truck and trailer and the automobile then moved some distance further and appellee was thereafter injured.

After the accident, the insurance carrier for the truck paid to appellee the sum of $27,000.00, obtaining from her a document entitled "A Covenant Not to Execute" (Exhibit No. 38). Appellant contends that this document was in reality a release of all joint tort feasors, since it was an unconditional release of one

joint tort feasor without reserving appellee's rights against the other.

Having admitted testimony as to appellee's intent in signing the document entitled "A Covenant Not to Execute," it was error for the court not to give a requested instruction on appellant's theory of the import of the document (appellant's requested instruction XVII).

Appellee contends that appellant railroad was negligent in maintaining a railroad overpass of insufficient width and height for vehicular traffic and that such negligence was a proximate cause of her injury. Appellant contends that there was no proof of negligence against it. It thus becomes necessary to set forth the exact physical nature of this area in some detail. U. S. Highway No. 99 turns at an approximate 90° angle about 800 feet north of the railroad overpass. The paved portion of this two-lane highway is 17 feet in width where the highway passes under the overpass. The overpass crosses the highway at an approximate right angle, and the vertical clearance under the overpass is about 12 feet 11 inches. The actual space between the sides of the overpass is 24 feet, but because the overpass and highway do not intersect at exact right angles, the true horizontal clearance is 21 feet 7½ inches. At the top corners of the overpass are triangular shaped metal "knee

braces" which somewhat diminish the vertical clearance over the gravel shoulders. (See Exhibit No. 3.) Significantly, neither the horizontal nor vertical clearance above the paved part of the highway is materially reduced because of the presence of the knee braces.

The evidence showed that the truck was 12 feet 3 inchs in height and 8 feet in width. The paved lane of the highway for vehicles travelling south was 8 feet 8 inches wide. According to Embleton's testimony (Tr. 73):

> "Well, just as I was entering the underpass, I noticed this red truck that had already started to enter the underpass going the other way. As I started through, I noticed he was quite aways over in my lane, and I said to myself, he is not giving me much room. So I swerved over to my right to avoid a collision and just about that time there was a crunch."

And (Tr. 92):

> "Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?
>
> "A. Well, hardly."

As shown by paragraph III of the stipulated statement of facts of the pre-trial order (Tr. 4):

> "Immediately prior thereto (the collision) the truck and trailer of Los Angeles-Seattle Motor Ex-

press, Inc., collided with a portion of said railroad overpass when its driver Thomas Ivisin Embleton swerved to his right to avoid colliding with a northbound truck which was entering the underpass and which was being driven partially over the center line of said highway." (Interpolation ours.)

At the time the Los Angeles-Seattle Motor Express truck came into contact with the overpass, it was moving at a speed of approximately 30 miles per hour. The truck then proceeded for a distance of 215 feet, and in its course collided with appellee's automobile and three other passenger automobiles, crushing them all against a telephone pole, which ultimately stopped the procession.

Appellant contends that there was ample clearance for the Los Angeles-Seattle Motor Express truck to pass through the underpass. According to Embleton's testimony, it was forced off the highway by the red truck. Therefore, appellee's charges that the overhead crossing was maintained at a height and width insufficient for the safe passage of persons making ordinary use of the highway is unsupported by the evidence. Even assuming that there was some satisfactory evidence of negligence on the part of appellant, such negligence was not the proximate cause of this accident.

Appellant further contends that the negligence of

the driver of the Los Angeles-Seattle Motor Express truck or the negligence of the driver of the red truck, or the concurrent negligence of each truck driver, constituted the sole, proximate cause of this accident.

The contentions here stated are presented on this appeal in several forms, viz., objections to the matter submitted by the trial court to the jury, objections to the giving of certain instructions, the failure to give certain requested instructions, and the failure of the trial court to grant appellant's motion for a directed verdict or its motion for judgment notwithstanding verdict, or in the alternative for a new trial.

SPECIFICATIONS OF ERROR

SPECIFICATION OF ERROR I

The Court erred in construing the covenant not to execute (Exhibit 38) as a covenant not to sue and not as a release. Objections were made to this construction of the document (Tr. 113):

> "THE COURT: I am going to call this document Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.
>
> "MR. VERGEERS: I think we will stand on the document itself.

"MR. GEARIN: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release."

SPECIFICATION OF ERROR II

The Court erred in failing to give any of the instructions hereinafter set forth which were requested by appellant. Objections were taken to such failure (Tr. 138-141).

A.

The trial court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

"B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

"C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient."

B.

The trial court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff has charged that defendant wa guilty of negligence in that it constructed and main tained its overhead crossing at a height insufficien for the safe passage of persons making ordinary use of the public highway.

"B. I instruct you that there is no evidence t support this charge.

"C. I accordingly instruct you to disregard th same and you are not to consider it in your deter mination of this case."

C.

The Court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff has charged that defendant wa guilty of negligence in that it constructed and main tained its overhead crossing at a width insufficien for the safe passage of persons making ordinary use of a public highway.

"B. I instruct you that there is no evidence t support this charge.

"C. I accordingly instruct you to disregard th same and you are not to consider it in your deter mination of this case."

D.

The trial court erred in failing to give the following instruction requested by appellant:

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court: see 8 O.C.L.A. Sec. 115-376 (e)):

" '(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an

ordinarily careful and prudent person might do i
the absence of such law."

E.

The trial court erred in failing to give the followin
instruction given by appellant:

"If you should believe from the satisfactory evi
dence that at the time plaintiff executed the agree
ment entitled '[Covenant] Not to Execute' on Jul
26, 1951, plaintiff did not expressly reserve the righ
to sue Southern Pacific Company, then in that even
I instruct you that the plaintiff can not recover an
your verdict must be against plaintiff and in favo
of defendant."

SPECIFICATION OF ERROR III

The court erred in giving the following instruction

"Vehicular traffic is entitled to use the entir
roadway including the shoulders and, in determin
ing whether defendant maintained its overhea
crossing with sufficient clearance, you are to con
sider whether an obstruction was being maintaine
over them, or any part of the roadway including th
shoulders."

SPECIFICATION OF ERROR IV

The trial court erred in withdrawing from the jury'
consideration the charge that the driver of Los Angeles

Seattle Motor Express' equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism thereon.

SPECIFICATION OF ERROR V

The court erred in ruling adversely upon appellant's motion for a directed verdict, for judgment non obstante veredicto and for a new trial.

SUMMARY OF ARGUMENT

The appellant's contentions are as follows:

1. The trial court erred in construing the covenant signed by appellee as a covenant not to sue and not as a release, because there was no reservation of right to sue any other tort feasor.

2. The trial court erred in failing to give certain instructions requested by appellant defining burden of proof and showing lack of proof to substantiate the charges of negligence, in failing to give the jury a requested statutory instruction showing the standard by which the jury was to measure the efficiency of the brakes of the truck involved in the accident, and in failing to submit to the jury appellant's theory of the effect of the execution of the subject covenant.

3. The jury was misled to the prejudice of appellan by an instruction that motorists have an absolute righ to use the shoulders of a highway regardless of an ob struction thereon, it being the appellant's position tha a motorist's right to use the shoulders of a highway is a qualified right.

4. The charge of negligence that the Los Angeles Seattle truck driver was operating the truck without ar adequate steering mechanism was erroneously with drawn from the jury's consideration by the trial court since there was substantial testimony to support the charge.

5. There was no evidence to warrant the submissior of the case to the jury. There was no evidence that any act or omission on the part of appellant was a proximate cause of the accident. The evidence conclusively showed that the sole proximate cause of the accident was the negligence of the driver of an unidentified truck or the negligence of the Los Angeles-Seattle truck driver or the combined negligence of the two truck drivers. There fore, the trial court erred in denying appellant's motion for a directed verdict, judgment non obstante veredicto, or in the alternative for a new trial.

SPECIFICATION OF ERROR I

The court erred in construing the Covenant Not to Execute (Exhibit 38) as a covenant not to sue and not as a release. Objections were made to this construction of the document (Tr. 113):

> "THE COURT: I am going to call this document, Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.
>
> "MR. VERGEERS (sic): I think we will stand on the document, itself.
>
> "MR. GEARIN: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release."

ARGUMENT

By the Pre-trial Order appellant contended that the execution of the document entitled "A Covenant not to Execute" was a release of Los Angeles-Seattle Motor Express, and as a matter of law therefore a release of appellant. Oregon subscribes to the general substantive rule that the release of one joint or concurrent tort

feasor releases all. *Stires v. Sherwood*, 75 Ore. 108, 145 Pac. 645.

Pacific States Lumber Company v. Bargar, 10 F (2d) 335, (9th Cir. 1926) is a case arising under the Oregon Employers Liability Act where this court had occasion to discuss the indicia of a covenant not to sue. It was there stated, page 337:

> " 'Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; *and* a reservation of the right to sue the other wrongdoer'." (emphasis added)

The document in question meets few of the tests prescribed by the *Bargar* case. Appellee to this date has the right to sue Los Angeles-Seattle Motor Express and/or its agents for any injuries she received in the accident. The agreement does not contemplate a cessation of litigation. By its execution appellee only relinquishes her right to collect any part of a judgment. There was no reservation of the right to sue any other wrongdoer.

Apart from the question that such a collusive agreement is a fraud upon the court because it did in effect

render nugatory appellant's privilege of making Los Angeles-Seattle Motor Express a third party defendant, we submit as a matter of law this agreement is not a covenant not to sue, but is in effect a release.

SPECIFICATION OF ERROR II

The court erred in failing to give any of the instructions hereinafter set forth which were requested by appellant. Objections were taken to such failure (Tr. 138-141).

A.

The trial court erred in failing to give the following instruction requested by appellant:

> "A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.
>
> "B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.
>
> "C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient."

ARGUMENT

This instruction is a correct pronouncement of the Oregon law as shown by Section 2-111, O.C.L.A., which provides:

"That evidence is deemed satisfactory which or dinarily produces moral certainty or conviction i an unprejudiced mind. Such evidence alone wi justify a verdict. Evidence less than this is denom inated insufficient evidence."

The Oregon court has repeatedly approved such a instruction and has held that a defendant is entitled t have the instruction given upon request. *Metropolita Casualty Ins. Co. of N. Y. v. Lesher, Inc. et al*, 152 Ore 161, 52 P. (2d) 1133; *Gwin v. Crawford*, 164 Ore. 215 100 P. (2d) 1012.

In *Willoughby v. Driscoll*, 168 Ore. 187, 120 P. (2d 768, 121 P. (2d) 917, the court held that a similar in struction should have been given upon defendant' request.

B.

The trial court erred in failing to give the followin instruction requested by appellant:

"A. Plaintiff has charged that defendant wa guilty of negligence in that it constructed and main tained its overhead crossing at a height insufficien for the safe passage of persons making ordinary us of the public highway.

"B. I instruct you that there is no evidence t support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

In bringing this action appellee relied principally upon *Krause v. Southern Pacific Co. et al*, 135 Ore. 310, 295 Pac. 966, where the plaintiff was injured while standing in the bed of a freight truck and facing the rear of the truck. As the truck passed under a railroad trestle plaintiff's head struck one of the steel girders supporting the trestle causing a fracture of plaintiff's skull. At the time of the accident the truck was proceeding upon the paved portion of the highway. The evidence showed that other trucks of like character had met with difficulty in passing under this trestle on account of insufficient vertical clearance. The Oregon Supreme Court in reversing the order of nonsuit granted by the trial court stated:

"It was the duty of the railroad company to so construct its trestle as to afford clearance for ordinary vehicular traffic."

In the instant case there was no satisfactory evidence that the overpass across the highway was a place of danger or that appellant had notice of the existence of

any dangerous condition. The operator of the Los An geles-Seattle truck testified as follows: (Tr. 90, 91)

"A. This type of equipment was new, fairly new the company was changing from what it did have the regular conventional trucks. They were buyin up these new ones.

"Q. This particular type built truck was called cab-over?

"A. Yes.

"Q. You had driven this rig about 5 times?

"A. Correct.

"Q. You had never had any difficulty before?

"A. No, never before.

"Q. You have driven this route up and down th coast for a good many years, haven't you?

"A. Yes.

"Q. You have driven higher rigs under this un derpass, haven't you?

"A. Yes.

"Q. How did you manage with them?

"A. Well, you have to slow down and go very slowly to get through with a higher rig. You have t go very slowly.

"Q. All the trucks that are the same genera height as the one you were driving—you had beer able to go through with them under the underpas with the same speed before, hadn't you?

"A. I had."

The truck was about 12′ 3″ in height. It is undisputed that the clearance above the entire paved portion of the highway was at least 7 inches or 8 inches above the height of the truck.

C.

The court erred in failing to give the following instruction requested by appellant: (Tr. 29)

> "A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.
>
> "B. I instruct you that there is no evidence to support this charge.
>
> "C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

The civil engineer called by appellee testified that the paved portion of the highway under the overpass was 17 feet in width, the easterly lane being 8′ 4″ wide and the westerly lane being 8′ 8″ wide (Tr. 36). The Los Angeles-Seattle truck which was 8 feet wide was travelling in the paved lane which was 8′ 8″ wide.

Mr. Embleton stated in response to certain question (Tr. 92):

"Q. Now, I think you have stated it before, Mr Embleton, that there is ample room in the under pass if both vehicles will keep on their own side o the center of the underpass, isn't that right?

"A. I said there is room to go in there, yes.

"Q. There is room to get by?

"A. Yes.

"Q. You have passed trucks under the underpas before, haven't you?

"A. Yes.

"Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?

"A. Well, hardly."

The testimony of all plaintiff's witnesses who testi fied upon the subject showed there was sufficient horizontal clearance under this overpass for two trucks each being 8 feet wide to pass in safety *if both trucks had remained on their own side of the highway.*

D.

The trial court erred in failing to give the following instruction requested by appellant (Tr. 30):

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court: see 8 O.C.L.A. Sec. 115-376 (e)):

" '(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law."

ARGUMENT

By the pretrial order appellant charged the driver of the Los Angeles-Seattle truck with negligence in operating the equipment without adequate or efficient brakes thereon and further charged that such negligence was the sole proximate cause of the collision. The testimony shows that although the truck was traveling at a speed of approximately 30 miles per hour it did not stop until it had traveled for a distance of approximately 215 feet beyond the overpass, pushing four passenger automobiles in front of it during its course of travel, the forward motion of the procession finally being stopped by a collision with a power pole.

By Section 115-375, O.C.L.A., it is required that any combination of motor vehicles shall be equipped with brakes sufficient to stop such vehicle on a dry, hard, approximately level strip of highway at a distance of 83.3 feet when traveling at 30 miles per hour. There was ample evidence that at the time of this accident the brakes of the truck did not comply with the mandate of the above statute. The physical facts of the accident patently display the inefficiency of the brakes.

Mr. Embleton testified that his brakes did not function properly after the alleged contact between the upper right corner of the truck and the knee brace of

the overpass. It would be imposing upon the credulity of this court to contend that the impact between the top corner of the truck's body and the knee brace affected the truck's braking system. Neither appellee nor the operator of the truck testified as to this.

Mr. Embleton stated (Tr. 89):

"Q. Mr. Embleton, after you had struck the underpass, you then put on your brake?

"A. I did.

"Q. After that time, or at any time thereafter, did your truck slow down or respond to your brakes?

"A. Well, I was wondering why I wasn't slowing down faster than I did, yes.

"Q. Your brake drums had water on them as you went under the underpass?

"A. I don't know, but I didn't see, like I said, why I didn't slow down. As I said at the previous hearing, there is always a possibility.

"Q. Referring to your testimony on page 36, the first question on that page:

" 'Q. Is it your testimony that your brake drums had water in them as you went under the overpass?

" 'A. They did.'

"Q. Is that what your testimony is now?

"A. They did, they would have to have some water in them."

It was the duty of the court to submit to the jury some standard by which they could measure the efficiency of the truck's brakes, particularly so when that standard is fixed by statute. Since the adequacy of the brakes was an issue in the trial of this cause, the failure to instruct as to the state law defining what are deemed to be adequate brakes was prejudicial error.

E.

The trial court erred in failing to give the following instruction given by appellant (Tr. 31):

> "If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled '[Covenant] Not to Execute' on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant."

ARGUMENT

As appears from pretrial Exhibit 38 there is no reservation of right to sue Southern Pacific Company contained in the covenant. The court construed the covenant as a covenant not to sue. Since one of the essentials of a covenant not to sue is a reservation of rights against other tort feasors (supra) the covenant would become

a release if there were no such reservation. Over appellant's objection appellee testified as to her intent in signing the covenant (Tr. 119).

Appellant contended by the pretrial order that the covenant was in effect a release. The question of reservation of rights was made an issue by the pretrial order and appellee's testimony. Appellant was entitled to have its position and the legal consequences thereof presented to the jury by the court's delivery of the above instruction.

SPECIFICATION OF ERROR III

The court erred in giving the following instruction (Tr. 126):

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders."

ARGUMENT

The above instruction is misleading as it defines a motorist's right to drive upon the shoulders of the roadway as absolute, when in reality it is a qualified

right. The Oregon law on this point is shown by th recent case of *Prauss, Admx. v. Adamski*, 54 Ore. Adv Sh. 803, 244 P. (2d) 598, where it was stated:

> "However, it must be borne in mind that a drive of a motor vehicle has a lawful right to drive on th gravel shoulder of the highway on his own right hand side whenever such gravel shoulder is suitabl for travel. In other words, the mere fact that on drives the whole or any part of his automobile on th gravel shoulder does not constitute negligence i and of itself, nor is such driver guilty of negligenc in leaving the paved portion of the highway to driv on such shoulder, if it may be done in reasonabl safety. But there might be conditions under which i would be negligence for the driver to leave the pave portion of the highway with any part of his vehicle Each case necessarily depends upon its own facts an circumstances."

All parts of the overpass maintained over the shoul ders of the highway were visible to a motorist usin reasonable care. The truck driver was no more entitle to drive against the knee braces of the overpass than h was to drive against any other barrier or sign main tained along the shoulder of the highway.

SPECIFICATION OF ERROR IV

The trial court erred in withdrawing from the jury' consideration the charge that the driver of Los Angeles

Seattle Motor Express' equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism.

ARGUMENT

The driver of the Los Angeles-Seattle truck was charged by the pretrial order with negligence constituting the sole, proximate cause of the accident in operating the truck without an adequate or proper steering mechanism. The trial court in instructing the jury withdrew this specification of negligence from its consideration, although there was substantial evidence to support the charge.

The testimony of the truck driver showed that after the alleged impact between the upper right corner of the truck and the overpass there was difficulty in steering the truck. The impact caused the truck to swerve to the driver's left and the driver then turned to his right, but he was unable to turn again to his left because his steering mechanism was impaired (Tr. 82, 83):

> "Q. You say the impact of your truck and the underpass lurched you to the left toward the center lane? Did you lurch toward the center line?
>
> "A. It did.
>
> "Q. You didn't cross the center line?
>
> "A. I was too busy, I didn't notice, but I didn't go very far over there.

"Q. You were able to turn the truck all right?

"A. Yes, I did.

"Q. Will you tell the Jury why you couldn't turn to the left again when you knew you were going to hit Mrs. Raish's car?

"A. As far as I know, I would say my steering mechanism was impaired."

And at pages 93 et seq. of the transcript:

"Q. You had some trouble with the steering of your truck, as I understand it?

"A. Well, after the impact, yes.

"Q. The only part of your truck that came into contact with the underpass was the upper right corner wasn't it?

"A. Yes.

"Q. Could your steering difficulty be caused by the wet pavement or gravel on the road, rather than something wrong with the steering mechanism?

"A. No.

★ ★ ★

"Q. Can you give us any explanation now of why your truck would not respond when you tried to turn it to the left?

"A. No, I can't." (Tr. 94)

★ ★ ★

Certainly if the Los Angeles-Seattle equipment had been driven back onto the pavement from the westerly

shoulder of the highway, there would have been no collision between the truck and the automobile in which plaintiff was riding. A party is entitled to have its formal specifications of negligence contained in the pretrial order submitted to the jury when there is substantial evidence to support the charge.

SPECIFICATION OF ERROR V

The court erred in ruling adversely upon appellant's motion for a directed verdict, for judgment non obstante veredicto and for a new trial.

ARGUMENT

The specific grounds urged in support of appellant's motions for a directed verdict, judgment non obstante veredicto or in the alternative a new trial appear in the transcript of record at pages 16, 17.

Since the error alleged in these motions is substantially the same they will be discussed together.

ABSENCE OF NEGLIGENCE ON PART OF APPELLANT

The only specifications of negligence remaining in the pretrial order at the conclusion of appellee's case in chief were the charges of maintaining the overpass

at an insufficient height and width for the safe passage of persons making ordinary use of the highway. The first ground of appellant's motion was that there was no evidence of negligence on the part of appellant as charged by appellee. The facts showing that there was no proof of insufficient height or width have already been discussed under Specification of Error II, (B) and (C) supra. Moreover, the uncontradicted evidence in this case establishes that at the time of this accident the persons using the highway under the overpass were not making an *ordinary* use of the highway.

"Ordinary" is defined by Black's Law Dictionary (3rd Ed. 1933) as:

> "Regular; usual; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The "ordinary use of the highway" in this instance would not mean the driving astraddle of the center line or over in the wrong lane of traffic, but traveling along the highway in the customary manner that trucks are driven upon this portion of the highway, the driver thereof being mindful of its condition.

Traffic on Oregon highways is regulated by Sections 115-301 to 115-383, O.C.L.A. By Section 115-327 O.C.L.A., subdivision (c) it is required:

> "In approaching any bridge, viaduct or tunnel, or approaching or crossing a railroad right of way or an intersection of highways, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right half is out of repair and for such reason impassable. This provision shall not apply upon a one-way street."

Subdivision (b) of Section 115-328, O. C. L. A. requires:

> "A vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

The trial court recognized that the railroad had a right to rely upon the presumption that motorists would exercise ordinary care in driving under its overpass. The jury was instructed (Tr. 126, 127):

> "The defendant * * * had a right to assume that all persons driving vehicles upon the highway would obey the law and would not drive in a careless and negligent manner."

Since the railroad was entitled to assume that the law would be obeyed and the uncontradicted evidence in this case showed there was a violation of the traffic law which proximately caused this accident, and had the law been obeyed there would have been no accident, it is submitted that there was no evidence that defendant was guilty of negligence.

This court should take judicial notice of the fact that U. S. Highway 99 is the principal arterial highway linking the states of Washington, Oregon and California, and as such is a very heavily travelled highway. There is no evidence in the record that any accident had ever occurred at this overpass before, although the record shows that higher trucks had been driven under this same overpass. There is no evidence that the warnings given were not sufficient to advise reasonably prudent drivers of any possible danger and none to indicate that defendant should have known or anticipated that drivers would conduct themselves as the operators of the Los Angeles-Seattle truck and the red truck did.

Without question, if the testimony of Embleton and witness Barnhardt (Tr. 61) is to be believed, the driver of the red truck was negligent as a matter of law in driving astraddle of the center line under the overpass. And in addition to the direct evidence on the subject the negligence of the operator of the Los Angeles-Seattle truck

in one or more of the particulars charged by the pretrial order is proven by the fact that the insurance carrier for the trucking company paid to the appellee the sum of $27,000.00.

There is no proof that the construction of the overpass was unlawful and, there being no proof on this point, the presumption is that the construction thereof was lawful. Moreover, if the overpass presented an obstruction in the highway the traveling public was required to take notice of it. As stated in *Lorentz v. Public Service Ry. Co.*, 103 N. J. Law 104, 134 Atl. 818,820, where plaintiff, a guest passenger in an automobile was injured as the result of a night-time collision with an unlighted railroad pier in the center of the highway:

> "It seems therefore clear, and indeed is not denied, that this elevated structure is a lawful structure * * *. Structures of this kind, authorized by law and used to facilitate public travel, although they are physical obstructions to drivers of ordinary vehicles and perhaps to pedestrians, are nevertheless not nuisances, and the public must take notice of them."

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> "We conclude that * * * a verdict should have been directed for defendant and it was error to refuse such direction."

In *Chicago R. I. & P. Ry. Co. v. James*, 192 Ark. 221, 91 S.W. (2d) 269, 271, where plaintiff had collided with the pier of a railroad trestle along the side of the road the court stated:

> "There was ample clearance with a wide margin for safe passage between the piers or bents. Plaintiff had only to notice where he was going, and what he was doing, and to exercise only ordinary care in driving, to pass under the railroad in safety, failure in which is negligence and was the cause of his injury."

PROXIMATE CAUSE

The second ground of appellant's motion for a directed verdict was that no act or omission of appellant constituted the proximate cause of this accident, it being appellant's position that the presence of the railroad overpass was a mere condition, as distinguished from cause, of the accident. The condition was apparent and known by all of the motorists involved in the accident.

In *Hansen v. The Bedell Co. et al*, 126 Ore. 155, 268 Pac. 1020, plaintiff, a pedestrian, had been struck by an automobile which had swerved to avoid a collision with a truck. The court found as a matter of law that the driver of the defendant truck was guilty of negligence in failing to yield the right of way to the other

automobile which swerved to avoid a collision and struck plaintiff. The court, in discussing proximate cause, quoted approvingly from *Hill, et al v. Jacquemart, et ux*, 55 Cal. App. 498 (203 Pac. 1021, 1022) as follows:

> "The proximate cause of an injury is the efficient cause; the one that necessarily starts the other causes in motion; the moving influence. (Authorities cited.) Here the proximate cause of the injury was the collision occasioned by the negligence of Mrs. Jacquemart running her automobile into that of Mrs. Hill. Without this collision the impact of the telephone pole happening immediately thereafter would not have occurred."

Foreseeable injury is a requisite of proximate cause and proximate cause is a requisite for actionable negligence. In order to show that an act of negligence is the proximate cause of an injury the consequence of the negligence should have been foreseen by the wrongdoer as likely to follow from its act or omission. *Aune v. Oregon Trunk Ry.*, 151 Ore. 622, 51 P. (2d) 663. If the injury complained of could not have been reasonably foreseen in the exercise of due care, the party whose conduct is under investigation is not answerable therefor.

As stated in Section 435, subdivision (2) of the Restatement of Torts (1948 Supp.):

> "The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

The existence of the overpass did not prevent the safe passage of persons making ordinary use of the highway. Hence the appellant in the exercise of due care could not have foreseen or anticipated that a truck would proceed astraddle of the center line forcing another truck and trailer off the highway and into collision with a portion of the overpass, thence on some distance to a point where the truck and trailer "bumped" a passenger automobile stopped off the highway, causing the truck and trailer to go out of control and crush the first automobile and three other automobiles into a power pole. In the words of the Restatement it is submitted it is "highly extraordinary" that the maintenance of the overpass should have brought about such harm. This occurrence was beyond the realm of probability.

Beckley, et al v. Vezu, et al, 23 Cal. Ap. (2) 371, 73 P. (2) 296, was an action for personal injuries sustained by plaintiffs when an automobile in which they were riding as guests struck the railing of a bridge within the City of San Bernardino, California. The complaint

named the driver of the automobile, the City and the County as defendants. The evidence showed that about midnight, as the driver approached the bridge, with which he was familiar, the lights of two other cars approaching from the opposite direction temporarily blinded him, and after these other cars passed he collided with the bridge railing. The driver testified he did not slacken his speed nor swerve before the collision with the railing, although he estimated that he had within 75 to 100 feet within which to make such a movement.

Statutory negligence was charged against the City and County for constructing and maintaining a dangerous structure or condition on the highway. The jury returned its verdict in favor of plaintiffs and against the City and County only, thus exonerating the defendant driver. The County moved for an instructed verdict which was denied and the County then appealed from the denial of its later Motion for judgment notwithstanding verdict. The appellate court in reversing the trial court stated: (p. 299)

> "Although he (the driver) knew the condition which existed at the bridge, knew its location with respect to a point which he had just passed, and knew that it was in close proximity, he continued with unabated speed even when he says his vision was obstructed. * * *
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> "After he actually saw the bridge and the bumper rail he had from 75 to 100 feet in which to

move over about the width of his car, with no other traffic approaching and nothing in his way. * * *

"* * *, the facts remain that the driver of this car continued at a high speed when he knew he was somewhere near the bridge, that he made no attempt to slow down when he did see it, and that he was then going so fast that he was unable to turn to his left about the width of his car, in a distance from 75 to 100 feet. In our opinion the evidence, taken most favorable to the respondents, discloses that the cause of this accident was the conduct of the driver of this car and the manner in which he drove the same. * * *

"* * * there is no evidence in the record to support a finding that the appellant had constructive notice that the existing condition was dangerous for such a driver. Rather unusal precautions had been taken to give warning of the condition, to guide traffic onto the bridge, and to protect the public. Whether or not it was possible to do more in this direction the precautions taken had proved sufficient for nearly a year and a half with heavy travel. There is no evidence that any other driver of an automobile ever had an accident because of this condition or that any claim had ever been made. There is no evidence that would tend to bring home to the appellant notice that the warnings given were not sufficient to advise reasonably careful drivers of any possible danger and none to indicate that it should have been known and anticipated that a driver would conduct himself as this one says he did. It follows that the court erred in denying appellant's motion for a judgment notwithstanding the verdict. * * *"

In *Daniels v. Cranberry Fuel Co.*, 111 W. Va. 484, 163 S. E. 24, plaintiff brought an action against the owners of an overhead mine track (a tipple) which passed over a paved highway at an angle, for injuries received in a collision between plaintiff's motorcycle and a Jewett automobile. The collision occurred under the overhead crossing. The jury returned a verdict in plaintiff's favor. Upon motion of defendant this verdict was set aside by the trial court and judgment was entered in favor of defendant, the trial court's action being affirmed on appeal.

The evidence established plaintiff was proceeding south along the highway in the daytime on his motorcycle, following a Chrysler car at a distance of about ten feet under the mine track overpass. The overpass was supported by timber piers on either side of the road. The highway under the overpass was about 18 feet wide, with the pavement being only 9 feet wide. The road curved in the direction the Jewett automobile was travelling so that Ricketts (the driver of the Jewett automobile), who was travelling in a southerly direction, had his view obstructed by the easterly pier. The Jewett automobile met the Chrysler car just as the Jewett car entered the highway beneath the overpass. The Jewett driver claimed that because of the narrowness of the road it was necessary for him to strike either the pillar

on his right or the motorcycle immediately behind the Chrysler. Ricketts stated he had not previously seen the motorcycle because the pier caused an obstruction to his view. Ricketts turned his car to his left and struck the motorcycle, injuring plaintiff.

The Supreme Court first denied that the maintenance of the overpass was a public nuisance, and then stated:

> "Nor can we see how the jury concluded that the maintenance of the pier was the proximate cause of the injury.
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> "In what manner can the injury be attributed to the timbers? The declaration charges that they obstructed the view on either side of the trestle; but plaintiff's view of the road was obstructed by the Chrysler car, and Ricketts could not see plaintiff for the same reason. Moreover, it should be remembered that driving north (or in the direction in which Ricketts was driving) the road curved to the left. Both Ricketts and plaintiff were familiar with the road and had driven over it on numerous prior occasions; hence it was incumbent upon each to use such care as the situation demanded of the ordinary prudent person in approaching the tipple and going under it. Ricketts says that it became necessary for him to strike either the timbers or plaintiff. Why did the timbers become an impediment to his travel? The road was about eighteen feet in width, sufficient for two cars to pass easily, safely and conveniently. Had the jury believed plaintiff, it must have believed his testimony that he was within three feet of the

timbers on his right. The handlebars of his motorcycle measured two feet in width. In what way could the timbers on the opposite side of the road by themselves prevent the Jewett car—67½ inches in width —from passing? The trial judge, with this evidence before him, supplemented by his observation of the witnesses, came to the conclusion, in a memorandum made a part of the record, that the proximate cause of the injury was not the pier, but it was the negligence of Ricketts or the driver of the Chrysler car (who does not testify) or the combined negligence of Ricketts and plaintiff; and for these reasons set the verdict aside. * * *"

A case peculiarly in point is *Gable v. Kriege*, 221 Iowa 852, 267 N. W. 86, where two death actions were consolidated for trial. The actions were originally brought against three defendants, and later by amendment the Chicago, Milwaukee, St. Paul & Pacific Railroad Company was made a fourth party defendant. Settlements were effected between plaintiffs and all defendants, except the railroad, and covenants not to sue those defendants were obtained. There was a trial as to the railroad only and at the close of all the evidence the trial court granted the railroad's Motion for a directed verdict. The Iowa Supreme Court affirmed the trial court's action.

The record disclosed that the tracks of the railroad defendant crossed a highway at a very slight angle. The

accident occurred in the early afternoon. One of the original defendants, Rex Kent, at the time in question, was driving down the highway from the north approaching the crossing. He was driving a truck with a load of gravel on an incline approaching the railroad crossing. The testimony of the plaintiff's witness, Rex Kent, the driver of the truck, showed that when he approached the track of the defendant railroad he hit a hole or depression, and the resulting jolt or jar broke a spring and shackle on the truck and caused it to go out of control. The truck driver testified he was driving down the hill 20 miles an hour, but as he approached the crossing he decreased his speed to about 15 miles an hour. After the truck went out of control it took a wobbly and uncertain course across the tracks of the defendant railroad and then veered at an angle towards the left or east side of the highway and about 150 feet south of the crossing collided head on with a Chevrolet car driven by Allen Gable, who was accompanied by his wife, two minor children and a guest. The collision resulted in the death of Mr. Gable, the two minor children and the guest.

The claim of the plaintiffs is that the defendant railroad failed to provide and maintain a good and safe crossing at the place of the accident. The Iowa Supreme Court in affirming the action of the trial court held:

"* * * The condition of the highway as complained of by plaintiffs was not the proximate cause of the accident and resulting damage. The defective equipment of the truck, and its overloading and excessive speed, were without question the proximate cause of the accident involved in this case. The driver of the truck, as plaintiffs' witness, testified that there were no brakes thereon; that there was a load of six or seven tons of gravel, and that the overload was at least three or four tons; that he approached the crossing at 12 or 15 miles an hour with a truck thus equipped and thus overloaded. It is certain that the left front wheel of the truck could never have gotten into the hole or depression on the west or right hand side of the highway, and the evidence clearly shows that the left front spring and shackle were broken, not from the condition existing at the crossing, but wholly on account of the defective equipment of the truck, the partial broken left spring, the overload of gravel, and the speed at which the truck was being driven. And this must be held to be the primary, efficient, and proximate cause of the resulting accident."

For the purpose of argument, assuming in the instant case there was some negligence on the part of the appellant, the subsequent intervening negligence of the Los Angeles-Seattle truck driver was so great as to be a superseding cause of plaintiff's injury. After the alleged contact between the upper right hand corner of the body of the truck and the knee brace of the overpass, causing a piece of metal about ⅜" thick to be torn

from the truck, the truck continued on for some distance at the same rate of speed because the brakes were not functioning properly. The driver was unable to turn away from the automobile occupied by plaintiff and off the pavement because of some defect in the steering mechanism. It would be contrary to the law of physics and the direct testimony to maintain that the slight contact between the upper right corner of the truck's cab and the overpass in any way affected the truck's braking or steering mechanism.

The question of proximate cause is ordinarily submitted to the jury. However, where the evidence concerning proximate cause is not substantially conflicting and is susceptible of but one reasonable inference the question of the proximate cause of a plaintiff's injury is then a question of law for the court. Such was the status of the evidence in this case and we submit that the trial court should have directed a verdict in appellant's favor.

CONCLUSION

The record in this case compels the following conclusions:

1. Appellee released all claims arising out of the accident when she executed the covenant.

2. The trial court erred to the prejudice of appellant in instructing the jury.

3. There was no evidence of negligence on the part of appellant which was a proximate cause of the accident.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,

JOHN GORDON GEARIN,

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